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Obstructionist Tactics in Decision-Making:

Key Elements for Consideration in the Context of a Treaty to End Plastic Pollution

Key Messages

- The ability to make decisions is fundamental to effective treaty negotiation.
- A small handful of countries continue to insist that voting should not be used to decide on substantive matters and are blocking the final adoption of the INC Rules of Procedure unless the possibility of a vote on substantive matter is deleted.
- The absence of clear decision-making and the possibility of resolving issues by voting favors the positions of the Members most reluctant to take necessary actions to end plastic pollution.
- INC-4 must resolve the lingering procedural uncertainty head-on to meet the mandate of UNEA resolution 5/14 to end plastic pollution.

Introduction

United Nations Environment Assembly (UNEA) resolution 5/14 was adopted by consensus and calls for the creation of an intergovernmental negotiating committee (INC) to develop a treaty to end plastic pollution.¹ At the time of writing (March 2024), there have been three INC sessions, with a fourth scheduled for Ottawa in April 2024 and a fifth for Busan in November 2024. In a break with the approach of majority voting used by most UN bodies,² grounded in the UN Charter,³ and included in rules for treaty negotiation, certain countries are seeking to create a new precedent of requiring consensus at the INC.⁴ The issue remains contested in the lead-up to INC-4.⁵ Countries seeking to block progress at the INC have insisted there can be no voting on substantive matters at the INC for a variety of reasons.⁶ This is in spite of multiple statements by the Chair noting that Members agreed to apply the Rules of Procedure (RoP) that include a last resort possibility of voting on a provisional basis at INC-1 and until RoP are formally adopted at a future INC, as well as confirmation by the UNEP Legal Officer that the draft RoP provisionally applied have legal effect.⁷

As a result, the INCs have been unable to make progress on the agreed treaty text, and fundamental questions of national obligations and negotiations are being obstructed by a small group of countries, stalling decisions and questioning the very mandate of the INC. Additionally, at INC-3, extensive negotiations on proposed elements for intersessional work could not reach a consensus. Therefore,

no progress could be made in the lead-up to INC-4 through official intersessional work. The challenges will become ever more acute as the negotiation process continues. The revised draft treaty text has nearly doubled in length after INC-3, with the addition of thousands of brackets and countless contradictory options. Without the possibility of voting, the resulting agreement will fall far short of what is needed and include only the positions that the small handful of least ambitious countries are willing to agree to. While the current procedural challenges relate to the application of the Rules of Procedure governing the INCs, the Rules of Procedure for the treaty's Conference of the Parties (COP) will need to be adopted separately by the COP. As such, the success of the INC and the treaty rely on the ability to vote at the INC.

Consensus as a Tool to Block Progress

Insisting on the *de facto* requirement of unanimity for consensus in all substantive decisions of the INC “makes it very difficult to move beyond the lowest level of ambition to which all countries can agree...[which] in turn frequently results in deadlock.”⁸ In practice, consensus decision-making often allows any Party to exercise a veto⁹ and, as a result, tends to water down any final product in a process that some have come to refer to as the “Law of the Least Ambitious Program.”¹⁰ Majority voting, by contrast, shifts negotiating power back to the majority interest, which better facilitates consensus-building and democratic decision-making; when majority voting is available — even as a last resort in the event of an impasse — minority interests are incentivized to compromise.¹¹ Indeed, there are countless examples of international institutions and treaties with majority voting provisions in which voting is never used or reserved as a last resort.¹²

One example of how the lack of a voting option can lead to failures to achieve the objectives of an agreement is the requirement of consensus that has plagued the United Nations Framework Convention on Climate Change (UNFCCC) since the initial drafting of its COP Rules of Procedure. Though the draft Rules of Procedure included options for majority voting, Saudi Arabia singlehandedly blocked them at the INC meeting leading up to the first COP.¹³ Since then, each COP has failed to resolve the matter. The result is a *de facto* requirement for consensus for substantive decisions (or veto power for every COP Party).¹⁴ The fact that decisions must be taken by consensus, which is frequently interpreted as requiring unanimity, has led to the failure to reach the ultimate objective of the UNFCCC, as established in 1992: “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”¹⁵

INC's Rules of Procedure Include Voting and Requiring Consensus Would Create an Unjustified New Precedent

In the context of intergovernmental negotiating committees of multilateral environmental agreements, including the most recent ones such as the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (BBNJ)¹⁶ and the Minamata Convention,¹⁷ the Rules of Procedure include provisions for voting. The availability of voting leads to compromise and widely accepted decisions, generally without resorting to actually voting. At the adoption of the BBNJ, one country expressed its reservations about the treaty but decided not to call for a vote out of deference to developing countries.¹⁸ The international negotiating committees for the Rotterdam and Stockholm Conventions also included rules for voting on substantive matters with a two-thirds majority required, and procedural matters by a simple majority.¹⁹ If the INC to develop a treaty on plastic pollution, including in the marine environment, were to conclude without the availability of voting, this would undermine incentives for Members to reach consensus on pivotal issues and set a concerning and wholly unjustified precedent.

Additional Procedural Obstructionist Tactics

In addition to pushing for all decisions to be taken by consensus and for consensus to be equated with unanimity, Parties will often engage in procedural maneuvering to stall debate and delay a decision or vote, sometimes by an afternoon or other times until a subsequent meeting.

A combination of procedural challenges and obstructionist tactics was on full display at the Rotterdam Convention's Eleventh COP in 2023.²⁰ Attempts to include chemicals that meet the scientific listing criteria, such as asbestos, started at COP3.²¹ However, because the addition requires consensus, a very small number of Parties have blocked their inclusion for the past 17 years.²² In 2022, Parties proposed a new procedure to create a new annex where chemicals could be added by a three-fourths majority, which would only be binding on those Parties that ratify it.²³ The Parties opposed to the amendment used the following tactics over the course of nearly the entire COP to try to prevent a vote, which finally occurred late on the final night of the meeting: calling for a working group, opposing the pre-approved co-chairs of the working group, proposing the addition of a third co-chair for the working group, claiming that all efforts to reach consensus could not be reached at the current meeting, calling for an opinion from the Legal Officer on procedural concerns, raising those same procedural concerns that the Legal Officer had already resolved in two points of order after voting had commenced, two

appeals of the Chair's determinations on the points of order consistent with those of the Legal Officer, requesting secret ballots for the vote on both of the unsuccessful appeals, a secret ballot for the vote on the amendment, and an unspecified motion to take no further action on voting and defer the issue to the subsequent COP.²⁴ Ultimately, the amendment fell short of the required three-quarters majority by just seven votes.²⁵ While the delaying tactics have proven a serious waste of time, this sequence also demonstrated the value of voting to support democratic decisions, including, as the case may be, defending the national interests of Parties arguing in favor of less ambitious measures.

A quorum call can be a way for a Party to stall debate and progress. It may even allow the Party time to engage in bilateral unofficial negotiations to shift the balance towards their position. Similarly, a Party may use a request to verify credentials to stall debate and progress. While accreditation is important to ensure that only individuals authorized to speak or vote on behalf of a Party may do so, calls for a second or third verification of credentials for upwards of 100 Parties can take a significant amount of time. At the Open-Ended Working Group (OEWG) for the creation of a science-policy panel on chemicals, waste and pollution prevention meeting in December 2023, both quorum calls and questioning accreditation happened multiple times during the election of officers for the two Eastern European States vacant seats, which stretched across two days.²⁶ A representative of a country seeking to be elected called for a point of order, claimed the representative presenting on behalf of the Eastern European States lacked the authority to do so, and proposed holding the election later in the week by secret ballot.²⁷ The Chair instead postponed the vote to the morning of the following day, where the same representative questioned the accreditation of Members and the quorum multiple times, resulting in the session being adjourned so that credentials could be reviewed, even though the Secretariat had announced that a quorum had been met and accreditation already verified twice.²⁸ When the session reconvened in the afternoon, a headcount was again conducted. The Chair announced the number of Members present and that a quorum had been met, followed by the election of officers by secret ballot.²⁹

Conclusion

Consensus as a decision-making approach in negotiating an treaty in which the health of humans and the planet are at stake can lead to outcomes driven by the objections of the least ambitious. To fulfill the mandate of the treaty called for in UNEA Resolution 5/14 that reflects the commitments sought by a majority of the world's countries, the possibility of voting is needed. Without resolving the procedural uncertainty around INC decision-making, a single objection can undo the majority of Members' tireless good-faith negotiating efforts. Not only is the text of the treaty at stake, but future decisions for a functioning treaty to end plastic pollution hang in the balance.

Endnotes

1. UNEA, Resolution 5/14, End plastic pollution: towards an international legally binding instrument, UNEP/EA.5/Res.14, (Mar. 2, 2022).
2. Rosalyn Higgins et al., *Oppenheim's international law*. (United Nations. New York: Oxford University Press, 2017).
3. United Nations Charter, June 26, 1945, Article 18.
4. UNEP, Report of the intergovernmental negotiating committee to develop an international legally binding instrument on plastic pollution, including in the marine environment, on the work of its second session, UNEP/PP/INC.2/5 (July 7, 2023), ¶ 61. “The intergovernmental negotiating committee understands that, based on discussions on the draft rules of procedure for the intergovernmental negotiating committee, there are differing views among intergovernmental negotiating committee members on rule 38, paragraph 1, and its reflection in the report of the intergovernmental negotiating committee on the work of its first session. Therefore, the provisional application of rule 38, paragraph 1, of the draft rules of procedure has been a subject of debate. In the event that rule 38, paragraph 1, is invoked before the rules are formally adopted, members will recall this lack of agreement.”
5. UNEP, Report of the intergovernmental negotiating committee to develop an international legally binding instrument on plastic pollution, including in the marine environment on the work of its third session, UNEP/PP/INC.3/5 (Dec. 1, 2023), ¶¶ 17-20.
6. UNEP, Report of the intergovernmental negotiating committee to develop an international legally binding instrument on plastic pollution, including in the marine environment, on the work of its second session, UNEP/PP/INC.2/5 (July 7, 2023), ¶¶ 38, 40, 43, 56.

7. The Chair requested the agreement of INC1 to apply the draft RoP provisionally, which was granted without objection and gavelled by the Chair. UNEP, INC-1 Day 1 – English, at 1:18:17-1:18:35, https://www.youtube.com/watch?v=N_GSIL0ILDs. At INC-2 a number of countries claimed that INC-1 had not agreed to provisionally apply the RoP and that brackets should be included around Rule 38 on voting. “At the invitation of the Chair, the principal legal officer of UNEP confirmed that the intergovernmental negotiating committee had agreed to function on the basis of the draft rules of procedure that applied on a provisional basis, except for the bracketed text in rule 37, until such time as the committee was in a position to adopt its rules, and that the rules therefore had legal effect.” UNEP, Report of the intergovernmental negotiating committee to develop an international legally binding instrument on plastic pollution, including in the marine environment, on the work of its second session, UNEP/PP/INC.2/5 (June 1, 2023), ¶ 40. At INC-3, the Chair again recalled that there had been agreement at INC-1 to apply the RoP on a provisional basis, aside from the bracketed Rule 37, and that the provisional application of the rules would apply to INC-3. The Chair requested, however, based on the intervention of a Member and recalling the interpretive statement from INC-2, that Members not request a vote on substantive matters under Rule 38, paragraph 1. UNEP, Draft report of the intergovernmental negotiating committee to develop an international legally binding instrument on plastic pollution, including in the marine environment, on the work of its third session, UNEP/PP/INC.3/L.1 (Nov. 14, 2023), ¶¶ 12, 14.
8. Katharina Rietig et al., “Unanimity or Standing Aside? Reinterpreting Consensus in United Nations Framework Convention on Climate Change Negotiations,” *International Environmental Agreements: Politics, Law and Economics* 23 (Sept. 2023): 222, <https://link.springer.com/article/10.1007/s10784-023-09593-y>.
9. No international legal instrument defines consensus as unanimity, however. United Nations Framework Convention on Climate Change. 2017. UNFCCC guide for presiding officers, ¶ 37. https://unfccc.int/sites/default/files/20170919_guideforpresidingofficers_final.pdf. Under UNCLOS, consensus means “the absence of any formal objection,” United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, Article 161.8(e). For the WTO Dispute Settlement Body, consensus occurs “if no Member...formally objects to the proposed decision.” Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Apr. 15, 1994, 1869 U.N.T.S. 401, Article 2, ¶ 4.
10. Jon Hovi and Detlef Sprinz, “The Limits of the Law of the Least Ambitious Program,” *Global Environmental Politics*, no. 6 (3) (Aug. 2006): 28.
11. Luke Kemp, “Framework for the Future? Exploring the Possibility of Majority Voting in the Climate Negotiations,” *International Environmental Agreements: Politics, Law and Economics* 16 (Oct. 2016): 761, <https://link.springer.com/article/10.1007/s10784-015-9294-5>.

12. The Montreal Protocol and the Global Environmental Facility are examples of environmental agreements with majority voting that had passed all decisions by consensus through 2016. Kemp, “Framework for the Future?,” 761. The INC for the Minamata Convention included voting on substantive provisions in the INC Rules of Procedure, but never resorted to voting. UNEP, Report of the intergovernmental negotiating committee to prepare a global legally binding instrument on mercury on the work of its first session, UNEP(DTIE)/Hg/INC.1/21 (July 15, 2010), Annex I, Rules of procedure of the intergovernmental negotiating committee to prepare a global legally binding instrument on mercury, Rule 37 [hereinafter Minamata INC RoP]. Multilateral environmental agreements with voting provisions generally approve the majority of decisions without ever calling for a vote.
13. Kemp, “Framework for the Future?” 758.
14. Farhana Yamin and Joanna Depledge. *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge University Press, 2004). There have, in fact, been some decisions taken at the UNFCCC without unanimity. For example, the COP16 President gavelled in the Cancun Agreements over a formal objection from Bolivia, stating that each country has “the right to be heard and have their views given due consideration” but not the right to unilaterally overpower the will of 193 other countries. Similarly, two years later, the COP18 President in Doha refused to recognize Russia’s request to speak and voice a formal objection to the Doha Amendment. At COP21, the Chair put Nicaragua’s request on hold and gavelled the decision before giving Nicaragua the floor. Rietig et al., “Unanimity or Standing Aside?,” 228-229.
15. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, Article 2. Even though the legally binding Paris Agreement includes the commitment to limit warming to well below 2°C and pursue efforts to limit warming to 1.5°C, it allows countries to unilaterally set their non-binding Nationally Determined Contributions to reduce emissions, which are far less than what is needed to reach the global goal. Instead of decreasing, global emissions and atmospheric CO₂ levels continue to rise, reaching their highest levels ever in 2022. UNFCCC, Conference of the Parties, Adoption of the Paris Agreement, FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015), Article 4; United Nations Environment Programme, *Emissions Gap Report 2023: Broken Record – Temperatures hit new highs, yet world fails to cut emissions (again)* (2023), <https://doi.org/10.59117/20.500.11822/43922>, p. XVI.
16. UNGA, International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, A/RES/72/249 (Jan. 19, 2018), ¶ 19. Paragraph 19 sets forth the voting rules on substantive matters, but no voting rules are included for procedural matters. Paragraph 18 notes that UNGA rules will apply, unless otherwise

specified in the Resolution A/RES/72/249. As such, Rule 85 of the UNGA Rules of Procedure applied to non-substantive matters under the BBNJ negotiating conference. United Nations, Rules of Procedure of the General Assembly, A/520/Rev.20 (2022).

17. Minamata INC RoP.
18. Rachel Tiller and Elizabeth Mendenhall, “And so it begins – The adoption of the ‘Biodiversity Beyond National Jurisdiction’ treaty,” *Marine Policy* 157 (Nov. 2023): 105836, <https://www.sciencedirect.com/science/article/pii/S0308597X2300369X>, International Institute for Sustainable Development, Earth Negotiations Bulletin, *Summary report, Further resumed 5th Session of the Intergovernmental Conference (IGC) on BBNJ* (June 19-20, 2023),
19. <https://enb.iisd.org/marine-biodiversity-beyond-national-jurisdiction-bbnj-igc5-further-resumed-summary>.
20. UNEP, FAO, Intergovernmental Negotiating Committee for an International Legally Binding Instrument for the Application of the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Provisional Rules of Procedure, UNEP/FAO/PIC/INC.1/2 (Nov. 21, 1995), Rule 34; UNEP, Intergovernmental Negotiating Committee for an International Legally Binding Instrument for Implementing International Action on Certain Persistent Organic Pollutants, Annex, Draft Rules of Procedure for the Meetings of the Intergovernmental Negotiating Committee for an International Legally Binding Instrument for Implementing International Action on Certain Persistent Organic Pollutants, UNEP/POPS/INC.1/2 (Apr. 30, 1998), Rule 37.
21. UNEP, FAO, Report of the Conference of the Parties to the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade on the work of its eleventh meeting, UNEP/FAO/RC/COP.11/25 (Aug. 28, 2023), ¶¶ 108-152 [hereinafter Rotterdam Convention COP11 Report].
22. Rotterdam Convention, Chrysotile asbestos, <https://www.pic.int/TheConvention/Chemicals/RecommendedtoCOP/Chrysotileasbestos/tabid/1186/language/en-US/Default.aspx>.
23. Rotterdam Convention COP11 Report, ¶ 134.
24. Rotterdam Convention COP11 Report, ¶¶ 111-112.
25. Rotterdam Convention COP11 Report, ¶¶ 113, 120-123, 129, 137, 141-144, 146-151.
26. Rotterdam Convention COP11 Report, ¶ 152.

27. International Institute for Sustainable Development, Earth Negotiations Bulletin, *Daily Report, 2nd Meeting of the Ad Hoc Open-ended Working Group on a Science-Policy Panel to Contribute Further to the Sound Management of Chemicals and Waste and to Prevent Pollution* (Dec. 11, 2023),
28. <https://enb.iisd.org/oewg2-science-policy-panel-contribute-sound-management-chemicals-waste-prevent-pollution-daily-report-11dec2023> [hereinafter ENB SPP Dec. 11 Report].
29. ENB SPP Dec. 11 Report.
30. ENB SPP Dec. 11 Report.
31. UNEP, Draft report of the second session of the ad hoc open-ended working group on a science-policy panel to contribute further to the sound management of chemicals and waste and to prevent pollution, UNEP/SPP-CWP/OEWG.2/L.1 (Dec. 13, 2023), ¶¶ 17, 18, 20.

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